

.CITY OF SAN JOSÉ, CALIFORNIA
Department of Planning, Building and Code Enforcement
801 North First Street, Room 400
San José, California 95110-1795

STAFF REPORT

Hearing Date/Agenda Number
P.C 8/11/04 Item:

File Number
PDA87-072-01

Application Type
Appeal of the Director's Decision to deny a
Planned Development Permit Amendment

Council District
5

Planning Area
Alum Rock

Assessor's Parcel Number(s)
484-56-048

PROJECT DESCRIPTION

Completed by: Deanna Chow

Location: Southwest corner of Capitol Avenue and Sierra Grande Way

Gross Acreage: 1.1

Net Acreage: 1.1

Net Density: n/a

Existing Zoning: A(PD)

Existing Use: Public eating establishment in a commercial center (Capitol Commercial Center)

Proposed Zoning: No change

Proposed Use: Planned Development Permit Amendment to allow late night use hours of operation between 12:00 midnight and 3:00 a.m. Thursdays, Fridays and Saturdays at an existing public eating establishment.

GENERAL PLAN

Completed by: DMC

Land Use/Transportation Diagram Designation
General Commercial

Project Conformance:
☐ Yes ☐ No
☒ See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING

Completed by: DMC

North: Commercial and Single-family Detached Residences

CG Commercial General and
R-1-8 Residence

East: Capitol Avenue and Single-family Detached Residences

R-1-8 Residence

South: Commercial and Multi-family Residential

CG Commercial General and
A(PD) Planned Development

West: Single-family Attached Residences

A(PD) Planned Development

ENVIRONMENTAL STATUS

Completed by: DMC

☐ Environmental Impact Report adopted
☐ Negative Declaration circulated on
☐ Negative Declaration adopted on

☒ Exempt
☐ Environmental Review Incomplete

FILE HISTORY

Completed by: DMC

Annexation Title: Capitol No._3-A

Date: March 8, 1957

PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

☐ Approval
☐ Approval with Conditions
☐ Denial
☒ Uphold Director's Decision

Date: _____

Approved by: _____
☒ Action
☐ Recommendation

CONTACT	APPLICANT	OWNER
Karina Galindo-Lozano 175 S. Capitol Avenue, #G San Jose, CA 95127	Karina Galindo-Lozano and Jaime Lozano 175 S. Capitol Avenue, #G San Jose, CA 95127	Chaska Teng P.O. Box 41151 San Jose, CA 95120

PUBLIC AGENCY COMMENTS RECEIVED

Completed by: DMC

Department of Public Works

✍ No Comments

Other Departments and Agencies

✍ San José Police Department, dated November 15, 2003 and June 9, 2004 (See Attached)

✍ East Valley/680 Communities NAC/SNI, dated November 25, 2003 and April 21, 2004 (See Attached)

GENERAL CORRESPONDENCE

✍ Carl Lindow (See Attached)

ANALYSIS AND RECOMMENDATIONS

BACKGROUND

This is an appeal of the Planning Director's decision to deny a Planned Development Permit Amendment (File No. PDA87-072-01) to allow an existing public eating establishment to operate between the hours of 12 midnight and 3 a.m. on Thursdays, Fridays and Saturdays. The Planning Director conducted a public hearing on June 30, 2004 and the Planning Director denied the Planned Development Permit Amendment on July 2, 2004. No one spoke in favor or against the proposed project at the Public Hearing. On July 12, 2004, the applicants, Karina Galindo Lozano and Jaime Lozano, filed an appeal of the Director's decision to deny the subject Planned Development Permit Amendment. The applicant provided no specific reasons for the appeal. (Notice of Permit appeal attached)

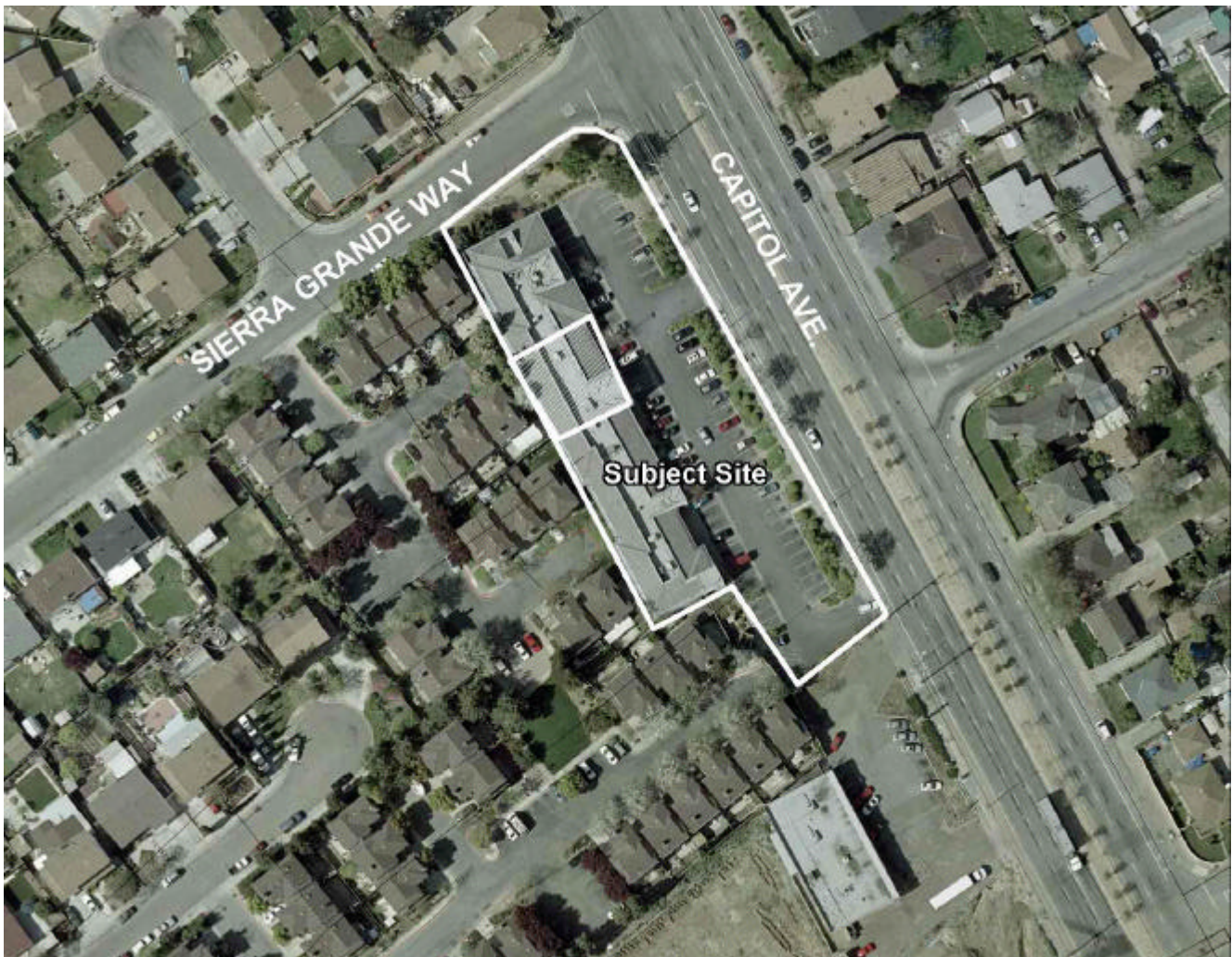
The site is zoned A (PD) Planned Development (File No. PDC87-01-04) which approved the mixed-use project that included the commercial center on one portion of the site and 45 single-family attached residences on a separate portion of the site. The allowed uses for the commercial center are those of the C-1 (currently CP – Commercial Pedestrian) zoning district. In Planned Development Zoning districts, a Planned Development Permit or Amendment is the functional equivalent of a Conditional Use Permit (CUP) although the process for these permits differs. The Planning Commission conducts initial hearings regarding the issuance of a CUP, whereas the Director conducts the initial hearings for a Planned Development Permit or Amendment.

On November 30, 1984, the City Council approved an amendment to the Zoning Ordinance that required all retail commercial uses in commercial zoning districts operating anytime between the hours of 12:00 midnight and 6:00 a.m. be subject to a Conditional Use Permit. In response to numerous

Requests for 24-hour uses and their potential impact on the livability of residential neighborhoods, on April 26, 1994, the City Council adopted City Council Policy 6-27, *Evaluation of 24-Hour Uses*, to provide additional guidance to the City in evaluating these proposals. The policy recognizes that some commercial areas are better suited than others for late night operations, given the potential to disturb neighboring residents. The inconsistency with this policy and the potential impact of the late night operation of the restaurant on neighboring residents was the basis for the Planning Director's denial of the proposed project.

Site and Surrounding Uses

The existing 2,400 square feet restaurant (Mariscos Vallarta) is located within the Capitol Commercial Center, a multi-tenant commercial center that consists of a variety of uses, including retail, personal services, office and restaurants. None of the uses currently operate after 12 midnight. As indicated on the aerial photograph below, the subject site is adjacent to single-family attached residences to the west, single family detached to the north across Sierra Grande Way, Capitol Avenue to the east, and commercial and residential uses to the south.



Aerial Photograph of Shopping Center with surrounding uses. Restaurant location identified.

The commercial center cannot be directly accessed from adjacent residential streets. The parking lot is accessed from two driveways on Capitol Avenue with only right turn in and out. The VTA light rail line runs down the median of Capitol Avenue. There are no adjacent buildings separating the commercial center from the residential uses. The shopping center and the residential project were designed together with units placed along the western and southern walls of the commercial building. The rear masonry wall of the commercial building, which has no openings, serves as the perimeter fence for the adjacent townhouse units' rear and side yards.

According to the San Jose Police Department, the restaurant is currently limited by its ABC license (Type 41- On-sale of beer and wine eating-place) to the sale of alcoholic beverages in conjunction with the sale of food to between the hours of 8 a.m. and 12 midnight. The applicant is proposing to remain open until 3 a.m. on Thursday, Friday and Saturday for the purposes of selling food, without any alcoholic beverage sale or consumption.

ENVIRONMENTAL REVIEW

The Director of Planning has determined that this project is exempt from further environmental review under the provisions of the California Environmental Quality Act under Section 15301 of the CEQA Guidelines, which section provides for a categorically exempted class of projects under CEQA that have been determined to not have a significant effect on the environment. Section 15301 exempts the operation of private structures or facilities involving negligible or no expansion of the use beyond that which already exists. The extension of hours being requested by the applicant involves a negligible expansion of use beyond that existing in the surrounding area in that only a change in the hours of operation is proposed.

This project did not warrant requiring the applicant to go to the expense of preparing a noise analysis. An analysis of the noise from the late night operation of the restaurant would be difficult to quantify and in staff's opinion would not rise to a level of significance under California Environmental Quality Act. The noise from the late night activity would likely pose a nuisance or disturbance to neighborhood residents rather than creating a significant environmental impact.

PUBLIC OUTREACH

A notice of the Planning Director's Hearing on June 30, 2004 for the proposed Planned Development Amendment and the Planning Commission hearing of the appeal were mailed to the owners and tenants of all properties located within a 500-foot radius of the subject site. Staff has been available to discuss the project with interested members of the public.

An e-mail message in opposition to the project was received from Carl E. Lindow on June 29, 2004. Mr. Lindow expressed concerns with the potential impact that the extended hours of operation would have on the neighboring residential area.

The proposed project was presented to the East Valley/680 Communities Strong Neighborhood Initiative Area at two separate meetings. On November 25, 2003, staff received comments from the East Valley/680 Communities Strong Neighborhood Initiative (SNI) residents that they do not support businesses that sell alcohol during late night hours. On March 18, 2004, the applicant presented the proposed extended hours to the East Valley/680 Communities SNI Neighborhood Advisory Committee

(NAC). The NAC supported the applicant's request for late night hours on the condition that no alcohol be served or live entertainment be provided during the extended hours.

GENERAL PLAN CONFORMANCE

The project site has a land use designation of General Commercial on the San Jose 2020 General Plan Land Use/Transportation Diagram. A restaurant is consistent with the General Commercial land use designation. Given that the proposed late night use is closer to the nearest residential units than what is specified by the City Council Policy, *Evaluation of 24-Hour Uses*, the purpose of which is to protect residential uses, the project does not conform to the General Plan. Therefore, the proposed extended hours in inconsistent with the General Plan's Commercial Land Use Policy #5, which states that commercial uses should only be allowed when the development is compatible with the residential development, and is primarily neighborhood serving.

ANALYSIS

As discussed in the background of this report, the City Council in 1994 adopted City Council Policy 6-27, *Evaluation of 24 Hour Uses* to provide guidance to the City in evaluating proposals requesting late night operation. The proposed project was analyzed against this policy and was found to be inconsistent with the policy and would impact the livability of the surrounding residential area. A discussion of these inconsistencies and impacts is presented in the following paragraphs.

The policy establishes that a 300-foot physical separation is needed between the 24-hour use and the nearest residential property line. In this case, the shopping center within which the restaurant is located straddles the property line with no setback from the adjoining two-story townhouse development. The front door of the restaurant is approximately 50 feet easterly from this property line on the opposite side of the building. In addition, there are residential units on the opposite side of Sierra Grande Way that are also closer than the specified 300 feet separation in the policy. These units are approximately 215 feet north from the front of the restaurant and approximately 100 feet from the northerly boundary of the parking lot in which the late-night vehicular and pedestrian activity will occur. The impact from headlights of vehicles maneuvering in the parking lot glaring into residences is an additional concern. The northern boundary of the parking lot is located approximately 100 feet south of the single-family detached residential homes across Sierra Grande Way, and approximately 65 feet east of the single-family attached residential uses along Sierra Grande Way.

It can be reasonably expected that there would be noise from car stereos, cars starting, doors shutting, conversations in the parking lot, and trash disposal that may not be quantifiable but would be particularly perceptible during these late hours, given the low level of ambient noise. The building does not provide an adequate buffer to screen the adjoining residential area, as it does not extend the entire length of the parking lot. There are townhouse units directly behind the restaurant on Republic Court and Republic Place. These units, in addition to those located closest to the parking lot on Declaration Drive, would be particularly vulnerable to any disturbances from patrons and vehicles during the late-night (early morning) hours. The seven-foot wall is clearly not of sufficient height to buffer the bedrooms of residents of the two-story residences from the late night/early morning activity that would typically occur in the parking lot. (see photo below) There is no secondary sound attenuation wall or other mechanism, other than the commercial building itself, to shield noises emanating from the site.

The applicant has indicated that they will provide on-site security during the proposed extended hours of operation. Specifically, the security will pay special attention to loitering and littering. The restaurant staff will also conduct a walk-through of the business parking lot and adjacent residential street to help ensure that customers do not leave behind litter. Staff believes that the proposed measures would not alleviate the aforementioned concerns discussed in this report.



Aerial and Ground level view of Parking Lot/Residential Interface at Southern end of Parking lot. Arrow indicates direction of ground level photograph.

The applicant has indicated that they do not intend to sell alcoholic beverages beyond midnight in accordance with their ABC license. However there is no ability with this permit to prevent the current or future owners of the restaurant from modifying their current ABC license to allow alcohol sales beyond midnight. Staff's main concern is not with the sale of alcohol but with the late night activity of the restaurant's employees and customers and their vehicles and its impact within this predominantly residential area.

Police Department Comments

A memorandum dated November 13, 2003 from the San José Police Department indicated that they were not in support of the request to remain open until 3:00 a.m., and were neither opposed nor supportive of operations until 2:00 a.m. The site is located in San José Beat M5. The reported crime statistics are over the 20% crime index, meaning that the beat had a crime level in 2003 more than 20% above the average for the City as a whole (See attached memorandum). On June 9, 2004, the Police Department issued an additional memorandum regarding the 24-hour uses at the restaurant. Because of the East Valley/680 Communities SNI residents' support of the 3:00 a.m. closing time, the Police Department indicated they would not oppose the extended hours.

The City Council Policy indicates that the likelihood of disorderly conduct of late night patrons on the surrounding neighborhood should be considered in the review process, especially as it relates to proximity of residential uses. Given the relatively high crime index in this police beat, Planning staff is concerned that the late night operations of the restaurant could increase the likelihood of disorderly conduct at the site. The Police did not raise this specific concern.

Conclusion

The City Council adopted the policy on the *Evaluation of 24-Hour Uses* to limit them to locations in which they could operate without detriment to nearby residential uses or the general welfare of the surrounding area. The proposed placement of a late night use in such close proximity to residential homes as proposed is a clear contradiction of the policy. The site is adjacent to residentially zoned and used property, does not achieve the 300-foot separation from surrounding residential uses as established by the *Evaluation of 24-hour Use Policy*, and has limited benefit of streets, buildings, physical features or secondary sound walls to help buffer the residences from the use. The proposed late night operation has the potential to create a nuisance to the nearby residents and impact the livability of the neighborhood. The operation of any commercial use beyond 12-a.m. midnight at this shopping center is not appropriate.

RECOMMENDATION

The Planning staff recommends that the Planning Commission uphold the Planning Director's decision to deny the Planned Development Permit Amendment.

The Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The project is located in the A (PD) Planned Development Zoning District.
3. The subject site (175 S. Capitol Avenue) is located in a multi-tenant shopping center that consists of a variety of commercial uses, including retail, personal services, offices and another restaurant.
4. The subject site is surrounded by single-family detached residences and commercial uses to the north,

Capitol Avenue to the east, commercial and residential uses to the south and single-family attached residences to the west.

5. The Planned Development Zoning (PDC87-004) allows uses under the Commercial Pedestrian (CP) Zoning District.
6. Section 20.100.900 of the San José Municipal Code (Zoning Ordinance) states that a Planned Development Permit, or Amendment, is a use permit, as well as a permit which addresses aesthetic and functional aspects of development.
7. The applicant has filed a Planned Development Permit Amendment to allow for late night use operation between 12:00 midnight and 3:00 a.m. on Thursdays, Fridays and Saturdays.
8. The restaurant is approximately 2,400 square feet, and the project does not propose any new construction.
9. The Planned Development Permit (PD87-09-072) states that the Director of Planning maintains the right of discretionary review of requests to alter or amend structures, conditions or restrictions of the PD Permit.
10. On November 30, 1984, the City Council approved an amendment to the Zoning Ordinance which required all commercial uses in commercial districts operating between the hours of 12:00 midnight and 6:00 a.m. be subject to a Conditional Use Permit.
11. The Evaluation of 24-Hour Use Policy (adopted by City Council on November 30, 1984) states that physical separation of incompatible uses is the best means to avoid potential problems. Twenty-four hour uses should generally not be located within 300 feet (measured from the building entrance and designated parking area to the residential property line) from any property residentially zoned, planned or used. Location of other buildings or physical features can help mitigate the separation requirement.
12. The site is directly adjacent to residential uses. The front door of the commercial use is approximately 50 feet east of the residential property line on the opposite side of the building that is on the property line.
13. The front door of the restaurant is approximately 215 feet from residential uses to the north across Sierra Grande Way. The northern boundary of the parking lot is located approximately 100 feet south of the single-family detached residential uses across Sierra Grande Way, and approximately 65 feet east of the single-family attached residential uses along Sierra Grande Way.
14. The southern boundary of the parking lot, which extends slightly beyond the length of the commercial building, is situated approximately 25 feet east of the residential property line, which has a masonry wall separating the uses.
15. The commercial center cannot be directly accessed from adjacent residential streets. The parking lot is accessed from two driveways on Capitol Avenue with right turn in and out only.
16. There are no adjacent buildings separating the commercial use from the residential uses. The rear masonry wall of the commercial building, which has no openings, serves as the perimeter fencing for some of the adjacent units' rear and side yards.

17. Crime statistics and police safety issues have been analyzed as part of the evaluation of the proposed permit.
18. A memorandum dated November 13, 2003 from the San José Police Department indicated that they were not in support of the request to remain open until 3:00 a.m., and were neither opposed nor supportive of operations until 2:00 a.m. The site is located in San José Beat M5. The reported crime statistics are over the 20% crime index and thus in 2003, the police beat has a crime rate more than 20% above the citywide average.
19. On November 25, 2003, staff received comments from the East Valley/680 Communities Strong Neighborhood Initiative (SNI) residents that they do not support businesses that sell alcohol during late night hours.
20. On March 18, 2004, the applicant presented the proposed extended hours to the East Valley/680 Communities SNI Neighborhood Advisory Committee (NAC). The NAC supported the applicant's request for late night hours on the condition that no alcohol be served or live entertainment be provided during the extended hours.
21. On June 9, 2004, the Police Department reissued a memorandum regarding the 24-hour uses at the restaurant. Because of the East Valley/680 Communities SNI residents' support of the 3:00 a.m. closing time, the Police Department does not oppose the extended hours.
22. The Planned Development Permit Amendment does not have the ability to condition the sales of alcohol at a bona fide eating establishment, which is under the purview of Alcoholic Beverage Control (ABC). Although the restaurant currently has an ABC license just to midnight, this Permit cannot limit alcohol sales in conjunction with the restaurant to end at midnight.
23. The applicant has indicated that they will provide on-site security during the proposed extended hours of operation. Specifically, the security will pay special attention to loitering and littering.
24. The applicant has indicated that restaurant staff will also conduct a walk-through of the business parking lot and adjacent residential street to help ensure that customers do not leave behind litter.
25. The parking lot is located approximately 65 feet (measured through the building) from the residential property line. There is no secondary sound attenuation wall or other mechanism, other than the commercial building itself, to shield noises emanating from the site. Car stereos, cars starting, doors shutting and conversations in the parking lot are reasonably expected to occur although may not be quantifiable.
26. For the purposes of CEQA, Planning staff considers the project to represent a minor alteration to an existing facility involving a negligible expansion of an existing use.

FINDINGS

The Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project is inconsistent with the *San José 2020 General Plan* Commercial Land Use Policies which states that commercial uses should be allowed when the development is compatible with the residential development and is primarily neighborhood serving.
2. The existing use (restaurant) is consistent with the Commercial Pedestrian (CP) uses allowed in the Planned Development Zoning on the site.
3. A Conditional Use Permit is required for commercial uses operating between the hours of 12:00 midnight and 6:00 a.m.
4. A Planned Development Permit Amendment satisfies the requirement of a Conditional Use Permit.
5. The proposed extended hours between 12:00 midnight and 3:00 a.m. on Thursday, Fridays, and Saturdays is inconsistent with the *Evaluation of the 24-hour Use Policy* adopted by the City Council.
6. The site is adjacent to residentially zoned and used property, does not achieve the 300-foot separation from surrounding residential uses to the north, west and south as recommended by the *Evaluation of 24-hour Use Policy*, and has limited benefit of streets, buildings, physical feature or secondary sound walls to help buffer the residences from the use.
7. The commercial use is located within a high crime index. Although the site itself may not have any significant problems, issues with properties in the vicinity have been raised. Disorderly conduct could create a nuisance to the nearby residences.
8. The East Valley/680 Communities Strong Neighborhood SNI NAC members have expressed support for the project with the condition that no alcohol is served during the extended hours. However, this permit cannot limit the sale of alcohol at a bona fide eating establishment; the permitting of alcohol at this restaurant is under the purview of Alcoholic Beverage Control (ABC).

Finally, based upon the above-stated facts and findings, the Planning Commission **denies** the proposed Planned Development Permit Amendment.